

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

SECURITIES AND EXCHANGE  
COMMISSION,

Plaintiff,

v.

SMALL BUSINESS CAPITAL CORP., et  
al.,

Defendants.

Case No. [5:12-cv-03237-EJD](#)

**ORDER DENYING MOTION FOR  
RELEASE OF FUNDS OR STAY OF  
PROCEEDINGS**

Re: Dkt. No. 1235

Presently before the court is Defendant Mark Feathers' ("Defendant") motion for an order releasing certain funds held in receivership so that Defendant "may retain and pay private counsel for his defense in his pending criminal case."<sup>1</sup> Dkt. No. 1235. In the alternative, Defendant "requests a stay of distribution of set-aside funds until resolution of his criminal appeals."

This motion is suitable for decision without oral argument and the hearing scheduled for June 29, 2017, is VACATED. Civ. L.R. 7-1(b). As to Defendant's requests, the court finds, concludes and orders as follows:

1. The instant motion, by its own terms, "is brought under the Sixth Amendment of the Due Process Clause." "The Sixth Amendment requires effective assistance of counsel at critical stages of a *criminal* proceeding." Lafler v. Cooper, 566 U.S. 156, 165 (2012) (emphasis added). Consequently, mention to it is unusual in a civil action like this one because "it is well-

<sup>1</sup> The criminal case is United States v. Feathers, Case No. 5:14-cv-00531-LHK. Defendant filed a motion similar to this one in the criminal case, which has since been denied by Judge Lucy H. Koh.

1 established that there is generally no constitutional right to counsel in civil cases.” United States  
2 v. Sardone, 94 F.3d 1233, 1236 (9th Cir. 1996). Rather, “[a] civil litigant’s right to retain counsel  
3 is rooted in fifth amendment notions of due process.” Anderson v. Sheppard, 856 F.2d 741, 747-  
4 48 (6th Cir. 1988).

5         2.         Nonetheless, Defendant “requests initial consideration of his motion for release of  
6 funds under the Sixth Amendment” in light of a reference to United States v. Spiegel, 995 F.2d  
7 138 (9th Cir. 1993), made by Judge Koh in an order filed within Defendant’s criminal action. In  
8 relevant part, the Ninth Circuit observed in Spiegel that a district court’s authority over a case is  
9 vested in the district itself; that is, authority to issue orders resides in all of the judges assigned to  
10 preside in the district, rather than in any one particular judge. 995 F.2d at 141 (citing United  
11 States v. Unimex, Inc., 991 F.2d 546 (9th Cir. 1993)). For Spiegel, this meant he could properly  
12 raise Sixth Amendment issues from his criminal case in a civil action before another judge of the  
13 same district, since an injunction issued in the latter case placed significant limitations on his  
14 ability to pay for retained counsel with his own funds. Id.

15         3.         Though the undersigned has no quarrel with the basic premise for which Defendant  
16 cites Spiegel, there are significant differences between the facts of that action and the  
17 circumstances presented here. First, unlike the judge assigned to Spiegel’s civil action, the  
18 undersigned is unable to consider any of the issues properly dedicated to the criminal case due to  
19 the recusal order filed on November 7, 2016. Dkt. No. 84 in Case No. 5:14-cv-00531-LHK.  
20 Being disqualified for cause on its own motion, it would be “incurable error” for this court to now  
21 proceed on an aspect of the criminal case and adjudicate Defendant’s Sixth Amendment claim.  
22 Stringer v. United States, 233 F.2d 947, 948 (9th Cir. 1956). Again, the Sixth Amendment does  
23 not govern issues of Defendant’s representation in the civil action, and could only be applicable in  
24 the criminal case.

25         4.         Second, Defendant does not persuasively explain why the undersigned has not been  
26 divested of jurisdiction to issue the order he requests, even if he brought this motion under the due  
27 process clause of the Fifth Amendment. “Once a notice of appeal is filed, the district court is

1 divested of jurisdiction over the matters being appealed.” Nat. Res. Def. Council, Inc. v. Sw.  
2 Marine Inc., 242 F.3d 1163, 1166 (9th Cir. 2001). It retains jurisdiction during the pendency of an  
3 appeal only to act to preserve the status quo. Id. Defendant has filed numerous notices of appeal,  
4 including one from the order granting the Securities and Exchange Commission’s summary  
5 judgment motion, by which the court essentially determined that Defendant did not own the funds  
6 he now seeks, and was not entitled to indemnification under certain provisions of the Funds’  
7 operating agreement. Dkt. No. 593. As such, distributing the funds to Defendant at this juncture  
8 would arguably represent a significant deviation from the status quo, if not completely undermine  
9 the findings that are on appeal.

10 5. Furthermore, Defendant’s request for an order staying distribution of the set-aside  
11 funds is moot in light of the order filed on February 10, 2017, which requires the Receiver to  
12 continue to maintain the funds until resolution of the appellate proceedings. Dkt. No. 1238.

13 For these reasons, Defendant’s motion is DENIED.

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15 **IT IS SO ORDERED.**

16 Dated: June 26, 2017

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18 EDWARD J. DAVILA  
19 United States District Judge  
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